SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 14

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF JACKSON, ETC.,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

REPLY BRIEF OF PETITIONER.

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There being no statute providing for the recovery of interest, the decisions of the Kansas Court that interest is not recoverable against the county should be followed.

The brief filed by the United States assumes that the treaty with the Pottawatomie Indians, and the Acts of Congress relating to the allotted lands are to be construed as though they contain by implication a provision somewhat as follows:

"In the event that a state or a subdivision of a state shall collect taxes on the allotted lands during the trust

> period, the state or subdivision of a state making such collection shall be liable to the United States as guardian of such Indian Allottee for the amount so collected, together with interest thereon at the rate of six per cent per annum from the date of collection."

Neither the treaty nor the statutes in fact contain such a provision. Nor can we find any indication that Congress intended to do more than declare the exemption. In these enactments Congress appears to have purposely left the remedy open to be governed by State law, or, at least, to be determined by the courts as a procedural question. The treaty and the Acts of Congress are drafted upon the assumption that States and subdivisions of States will observe the exemption and will not levy and collect taxes on the allotted lands during the trust period. In framing the treaty and the statutes the Federal authorities did not attempt to deal with the form or the extent of the remedy in the event a State or a subdivision of a State should collect taxes in disregard of the exemption.

There being, then, no statutory provision for the recovery of interest, the question is whether the principles applied in the State courts or the principles applied in the Federal courts are to govern in determining the right to recover interest?

We have shown in our original brief that under the Kansas decisions, in the absence of any specific statute, interest is not collectible in suits against the county for the recovery of taxes unlawfully collected (Brief, pp. 13-16). There appears to be a general conflict between State court decisions and Federal court decisions on the question of recovery of interest in the absence of a statute expressly authorizing it. Thus, in *Billings* v. *United States*, 232 U. S. 261, the court says on page 287:

> "The conflict between the systems is pronounced and fundamental. In the one, the state rule, except as to

contract, no interest without statute; in the United States rule, interest in all cases where equitably due unless forbidden by statute."

The respondent's brief cites the cases of *Educational Films Corp.* v. *Ward*, 282 U. S. 379, 386 n., and *Procter & Gamble Distributing Co.* v. *Sherman*, 2 F. (2d) 165 (S. D. N. Y.), as holding the remedy at law to be inadequate and granting equitable relief in cases where the State has not provided for interest on taxes legally refundable. These cases demonstrate that if the suit is at law, in the absence of a State statute specifically allowing interest, interest cannot be recovered. The present suit is at law, and not a suit in equity. Hence, the remedy obtainable in this case will not include the recovery of interest under the authorities just cited.

The decisions in these cases that the absence of a right to recover in a suit at law, interest on taxes wrongfully collected makes the remedy at law inadequate do not intimate that the State laws are for that reason unconstitutional. But they do demonstrate that when, as here, a suit at law is brought to recover taxes, the State can discharge its full liability by payment of the principal without interest.

The rule announced by this Court in *Erie R. Co.* v. *Tompkins*, 304 U. S. 65, that:

> "In federal courts, except in matters governed by Federal Constitution or by Act of Congress, law to be applied in any case is the law of the state",

while perhaps not decisive of the point involved in the present case, shows quite definitely the Federal court trend towards following the State court decisions on questions which might be described as judge-made law as distinguished from statutory law. And the question here involved is of that nature.

Hence, the court should here adopt and follow the rule so frequently applied by the Kansas court that a county, in the absence of a definite statute so providing, is not liable for interest on taxes wrongfully collected.

Even under the Federal Court rule as to liability for interest, there is no liability in the present case.

In *Billings* v. *United States*, 232 U. S. 261, 286, the Federal Court rule with reference to the recovery of interest where there is no statute requiring its payment is thus stated:

> "that a statute was not necessary to compel its payment where in accordance with the principles of equity and justice in the enforcements of an obligation, interest should be allowed."

Applying the test here laid down, the inquiry is, do "*the principles of equity and justice*" require that interest should be paid? The contention throughout the Government's brief is that interest should be allowed in order that the incompetent Indian may be fully compensated.

Clearly, however, in determining whether or not equitable principles require the payment of interest in any given case the question must be examined not merely from the standpoint of the claimant, but also from the standpoint of the party who will have to pay. It is not alone sufficient in the present case to conclude that the incompetent Indian may not be fully compensated until he receives interest, as well as principal, on the amount of taxes he paid. It is necessary also to inquire whether the county may in fairness and equity be required to make the payment. It is to be remembered that the President actually issued a full fee title patent to this Indian before any taxes on the allotted lands were levied and collected by the county. The patent had all the earmarks of validity, and there was no known fact or circumstance that might have put the county upon suspicion

that any infirmity existed in the patent. The county was clearly warranted in assuming that after the issuance of such patent, the land was subject to taxation. We call attention to the provision in the latter portion of Article 3 of the Treaty (petitioner's brief, p. 27) which refers to the rights of the allottee after the issuance of a fee patent by the Government. It is there provided that:

> "thereafter the lands so patented to them shall be subject to levy, taxation, and sale, in like manner with the property of other citizens."

The patent in question was issued to the allottee and was delivered to her. It is a well-known principle of law that public officers are presumed to do their duty, and there is a further presumption that all necessary preliminary steps to the issuance of a patent have been taken.

Wright-Blodgett Co. v. *U. S.*, 236 U. S. 397;
Bouldin v. *Massie*, 7 Wheat. 122, 5 L. Ed. 414;
U. S. v. *Peterson*, 34 F. (2d) 245;
U. S. v. *Porter Fuel Co.*, 247 Fed. 769, 159 C. C. A. 627.

It was therefore proper for any one to assume that the patent had been regularly issued.

U. S. v. *Beaman*, 242 Fed. 876, 155 C. C. A. 464;
Harkrader v. *Carroll*, 76 Fed. 474.

At this point we wish to call attention particularly to section 6 of the General Allotment Act of February 8, 1887, as amended by the Act of May 8, 1906 (34 Stat. 182, 25 U. S. C. A., Sec. 349) which we set out partially as Appendix C of our original brief before this Court. We find we did not include enough of this section in that quotation. In addition to the provisions there set out, the act provided as follows:

> "Provided, That the Secretary of the Interior may, in his discretion, and he is authorized, whenever he

shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed and said land shall not be liable to the satisfaction of any debt contracted prior to the issuing of such patent:"

In the case of *Miller* v. *United States*, 57 F. (2d) 987, upon application of certain Indian allottees who held trust patents to land under the General Allotment Act of 1887, the Secretary of the Interior sent out a competency commission (just as was done in the present case) to investigate their intelligence. Upon a finding of the commission that the Indians were competent, the Secretary found they were capable of managing their own affairs and upon his recommendation fee patents were issued. The court referred to section 6 (quoted above) of the General Allotment Act as amended and held as follows:

> "The master was confronted with the rulings of the Secretary, and we think the Secretary's findings that the Indians were competent cannot be ignored, but must be accepted for all purposes of these appeals; unless the rulings can be avoided on some settled principle of equity. United States *v.* Budd, 144 U. S. 154, 12 S. Ct. 575, 36 L. Ed. 800; United States *v.* Stinson, 197 U. S. 200, 25 S. Ct. 426, 49 L. Ed. 724; Lykins *v.* McGrath, 184 U. S. 169, 22 S. Ct. 450, 46 L. Ed. 485; Durango Land & Coal Co. *v.* Evans (C. C. A.), 80 Fed. 425; United States *v.* Northern Pac. R. R. Co. (C. C. A.), 95 Fed. 864."

In the case of *Larkin* v. *Paugh*, 276 U. S. 431, an allottee holding a trust patent requested that a fee patent be issued prior to the expiration of the twenty-five year trust period provided by the General Allotment Act of 1887. The Secretary of the Interior approved the application but the

Indian died just prior to its issuance. In passing upon the question as to whether under these circumstances the patent would pass the title this Court said:

> "With the issue of the patent, the title not only passed from the United States but the prior trust and the incidental restriction against alienation were terminated. This put an end to the authority theretofore possessed by the Secretary of the Interior by reason of the trust and restriction—so that thereafter all questions pertaining to the title were subject to examination and determination by the courts, appropriately those of Nebraska, the land being there. Brown *v.* Hitchcock, 173 U. S. 473; Lane *v.* Mickadiet, 241 U. S. 201, 207 *et seq.*"

Thus at the time of the issuance of the fee patent, in the present case, there was a Federal statute and rulings of this Court which apparently authorized its issuance upon the finding of a competency commission that the Indian was capable of managing her own affairs. Such a finding was made and in view of the statute, the finding of the commission and of the issuance of the patent the county was fully warranted in assuming the Indian had been emancipated by the Government. She was living just as fully, intelligently and efficiently as any white citizen of that vicinity; she was receiving all of the benefits of local government and accordingly the year following the issuance of the fee patent the county placed the land upon the tax roll. This action was obviously occasioned by the attitude of the Federal Government. If the county had investigated the proceedings leading up to the issuance of the fee patent they would have discovered all of the facts as shown in the record, which indicate that the Indian allottee in question was fully competent to handle her own affairs. It is interesting to note that from the wording of the Act of February 26, 1927 (Appendix D of our original brief) Congress and the Federal Government

deemed it essential to pass a particular act authorized the cancellation of patents like the one issued to the allottee in the present case. That act provided that the Secretary of the Interior was authorized "in his discretion" to cancel such patents. The implication being that until they were cancelled, they were in full force and effect. The act also provided, "that upon cancellation of such patent in fee simple the land shall have the same status as though such fee patent had never been issued." Thus it is apparent Congress considered that while the fee patent stood uncancelled the land was subject to taxation just as was provided in the original treaty. It is also interesting to consider that at any time before the revocation authorized by this particular statute the Indian could have alienated his land. In that event, the taxes which had been collected would not have been subject to refund, and the patent originally issued would not have been subject to cancellation; for this act definitely provides that it shall not apply if the Indian fee patentee has mortgaged or sold any part of the land described in his patent.

The language of the brief of the respondent invokes the sympathy of the court for the poor Indian who has been mulcted out of his money by a hard-hearted county. The county stands ready here to refund the money which was paid to it by the Indian. If any equity to recover interest exists in favor of the Indian, that equity exists as against the Federal Government alone, for the acts of the Federal Government induced the Indian to pay and the county to collect the disputed tax.

The respondent's brief cites two cases in which interest on taxes paid by an Indian allottee was included in a judgment for recovery of taxes unlawfully collected; the cases cited being *Ward* v. *Love County*, 253 U. S. 17, and *McCurdy* v. *United States*, 264 U. S. 484.

While it is conceded by respondent that the question of interest was not presented to, discussed or considered by the court, the two cases are cited as precedents for allowance of interest.

If the court had in those cases given consideration to the question of whether or not interest was recoverable and had held that the Federal rule referred to in *Billings* v. *United States, supra,* was applicable, there would have been good ground to apply it, for interest might well have been held recoverable *in accordance with the principles of equity and justice.* An examination of the two cases shows that in each of them the county, when it collected the tax, was well advised that the right to collect was disputed and probably illegal. Contrasted with those circumstances we call attention to the entire ignorance of the county in the present case of any facts which would impair the apparent validity of the fee title patent held by the Indian when these taxes were collected.

We have pointed out hereinbefore that the case of *Billings* v. *United States, supra,* 232 U. S. 261, holds interest may be collected only where to do so accords with principles of equity and justice. But there is an additional distinction that may be made between the facts in that case which led the court to award interest, and the facts in the present case. In the *Billings* case the debt was found to be due on a date certain, with full notice thereof to the debtor. As is set out in the brief of the respondent in this case (p. 24) the record is silent as to when a demand for the return of the tax money was made. So far as is shown, no specific demand was made until the filing of the suit in December, 1936. Also so far as the record shows the petitioner knew nothing of the failure of the competency commission to secure the consent of the allottee to the issuance of the fee patent, away back in 1918. Had the petitioner been advised of the full

facts of the situation, it is conceivable that it would have refunded all taxes theretofore collected and would have ceased to make future levies. Certainly the Government did nothing to advise the county until the fee patent was cancelled in 1935, some sixteen years after the county began collecting the taxes in 1919. Under the rule frequently announced by this Court interest may only be collected, in the absence of a statute or contract, as damages for money wrongfully withheld. The many cases cited by the respondent where the collection of interest was held proper are those where the debtor refused to pay or refund after full advice and knowledge that the money was due. A similar situation existed in the case of *United States* v. *Carpenter*, 84 F. (2d) 813. Beginning on page 814 of the opinion of that case, the court held as follows:

> "Redfield *v.* Ystalyfera Iron Company, 110 U. S. 174, was an action to recover customs dues illegally exacted and interest thereon. The court said:
>
> > "'Interest is given on money demands as damages for delay in payment, being just compensation to the plaintiff for a default on the part of his debtor. Where it is reserved expressly in the contract, or is implied by the nature of the promise, it becomes a part of the debt, and is recoverable as of right; but where it is given as damages it is often a matter of discretion.'
>
> "Lincoln *v.* Claflin, 7 Wall. 132, speaks of interest allowable as discretionary in distinction from that allowable as a matter of law. The Redfield case was followed in United States *v.* Sandborn, 135 U. S. 271, and the principle applied in Jourolmon *v.* Ewing (C. C. A.) 80 F. 604. In the Billings case *supra* the action was to recover a tax due on a specified day by the statute which imposed it. It was payable on that day, and being payable on that day by statute it was held that interest accrued on and from that day. In the case now under consideration no statute prescribed a date

on and from which erroneous refunds should bear interest, nor the rate thereof, prior to the Act of June 22, 1936. So far as the record here discloses nothing occurred to apprise appellee that she might be required to return the refund until demand therefor was made upon her on July 15, 1933. She made no demand for the refund and may not have known, so far as the record shows, that it was a disputed question whether she was entitled to retain the refund as her own. She doubtless had no thought that it was imposed on her in trust and that she might be liable for interest from the time she received it. To now charge her with $1,100 on that account impresses us as inequitable, not demanded by any law—statutory or otherwise;"

In the same way here. The Petitioner did not know until long years later that there was any dispute about its right to collect taxes from the Allottee. The county disbursed the money to the State of Kansas; to other municipalities and to its own obligations without any knowledge until at least 1936 that it would be called upon to make any refund. Clearly it would be directly contrary to principles of justice and equity, as specified in the *Billings* case, to now require the county to pay interest by way of damages for the withholding of money it did not hold.

There is one final consideration. The Government was the moving party all through the period when the asserted liability of the county accrued. The Indian, although competent, agreed to the inconsistent and contradictory acts of the Government. Even as to money due the Government itself interest may not be collected where there has been a long delay in the assertion of the right to recover. The case of *Sandborn* v. *United States*, 135 U. S. 271, is good authority in that respect. It was there held:

"When the United States makes a long delay in the assertion of its right to recover back money which it is entitled to recover back, without showing some reason

or excuse for the delay, interest before the commencement of the action is not recoverable; and this is especially true when it does not appear that the defendant has earned interest upon the money improperly received by him."

The record in the present case is silent as to any reason or excuse for the long delay on the part of the Government in attempting to secure refund and it certainly does appear from the record that the county has not earned interest upon the money it collected by way of taxes from the Allottee.

We submit that it should be the holding of this Court that interest should not be recoverable.

Respectfully submitted,

The Board of County Commissioners of the County of Jackson, in the State of Kansas, a Body Politic and Quasi Public Corporation,

Petitioner,

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